Filed 11/23/09 Contreras v. Wong CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JULIO CONTRERAS, Plaintiff and Appellant, v. RICO WONG, Defendant and Respondent.	A122772 (San Francisco County Super. Ct. No. 462338)

Appellant Julio Contreras sued respondent Rico Wong for damages after the two were involved in an automobile accident. Following a court trial, the court refused to award appellant money in the amount he had already received from his insurance carrier. Appellant argues that he was not barred from recovering what he had already been paid by his insurance company, and that the trial court erred in giving preclusive effect to a decision in a prior arbitration between the parties' insurance carriers. We affirm the judgment.

I.
FACTUAL AND PROCEDURAL BACKGROUND

Appellant and respondent were involved in a car accident in the early morning hours of April 28, 2005, at the corner of Portola Drive and O'Shaughnessy Boulevard in San Francisco. According to the stipulations of fact submitted to the trial court, respondent caused the accident by driving through a red traffic light and hitting

appellant's car, causing it to spin around and hit the front of a bakery truck stopped at the intersection's traffic signal.

Appellant was insured by California State Automobile Association (CSAA). CSAA paid appellant $11,729.12 to reimburse him for the cost of repairing his car, plus $750 to partially reimburse him for the $1,200 he paid to rent a car from his friend while his own vehicle was being repaired, for a total reimbursement of $12,479.12.

Appellant's policy with CSAA included the following subrogation clause: "In the event of any payment under this policy, we are entitled to all the rights of recovery of the person to whom payment was made against another. That person must sign and deliver to us any legal papers relating to that recovery, do whatever else is necessary to help us exercise those rights and do nothing after loss to prejudice our rights. [¶] When a person has been paid damages by us under this policy and also recovers from another, the amount recovered from the other shall be held by that person in trust for us and reimbursed to us to the extent of our payment." (Unnecessary boldface removed.)

CSAA sought reimbursement from respondent's insurer, Farmers Insurance Exchange (Farmers), for the money that it had paid to appellant. Farmers refused to pay, and the companies' dispute was submitted to binding arbitration with Arbitration Forums, Inc. in Lakewood, Colorado. CSAA filed a "Contentions Sheet" arguing that, based on the police report in connection with the automobile accident, respondent was the sole and proximate cause of the crash. Farmers disagreed, arguing in its submission to the arbitrator that the police report was inconclusive, and that appellant's negligence in fact was the sole cause of the accident. In a one-paragraph decision issued on December 27, 2005, the arbitrator concluded that CSAA failed to prove its case. The decision stated: "No statements taken by adj. All vehicle photos should be included. Independent light sequence should have been completed. Witness canvas[s] might have produced an independent wit[ness]. Applicant did not prove their [*sic*] case." (Unnecessary capitalization removed.)

On April 12, 2007, appellant filed the instant action against respondent for property damage.[1] Although the record on appeal contains a docket, few pretrial briefs are included in the record. Neither party's trial brief appears in the record. Respondent filed a motion for nonsuit before trial (cf. Code Civ. Proc., § 581c, subd. (a) [defendant may move for nonsuit only after plaintiff has completed opening statement]), apparently on the ground of collateral estoppel; however, the motion is not included in the record on appeal. On March 13, 2008, the day of a court trial in the matter, respondent filed a motion to file an amended answer to allege res judicata and collateral estoppel; however, neither the motion nor any proposed amended answer is included in the record on appeal.

Respondent's negligence was essentially conceded at trial. The parties submitted a stipulation, which was relied on by the trial court when it issued its ruling, that stated: "The cause of the accident was [respondent] entering the intersection after driving through a red traffic signal in his . . . van, hitting [appellant's] [car] and causing it to spin around and hit the front of a bakery truck which was stopped at the traffic signal . . . ." Appellant, the sole witness to testify at trial, described the accident and testified about the damages he suffered. After the close of evidence, respondent argued that appellant was barred under the terms of the subrogation clause in appellant's CSAA contract and under the doctrines of res judicata and collateral estoppel from recovering money that CSAA paid to him.

The trial court first granted respondent's motion to amend his answer to allege res judicata and collateral estoppel. The trial court agreed that appellant was not entitled to recover money that he had already received from CSAA. Were the court to award the amount already paid by CSAA, appellant would be reimbursed twice for the same property damage, the court stated. CSAA then would have a right of reimbursement against appellant pursuant to the subrogation clause in appellant's policy. Because CSAA already lost its claim against Farmers in arbitration, it would in effect be given a

[1] Appellant's complaint also sought damages for bodily injury, but appellant later dismissed with prejudice his bodily injury allegations following a settlement of that portion of his claim.

"second bite of the apple," because appellant would be obligated to reimburse the insurance company the same amount of money that the company sought (but was denied) in the prior arbitration proceeding. However, the trial court denied respondent's motion for nonsuit, concluding that appellant was entitled to money that he had not received from CSAA. The trial court awarded appellant $450, the unreimbursed amount he had paid to rent a car from a friend while his own car was being repaired.[2] Although the trial court explained at the court trial its reasoning, it did not issue a statement of a decision, presumably because no party requested one.

Judgment was entered on April 21, 2008.[3] Appellant filed a motion for a new trial, which the trial court denied. Appellant timely appealed.

II.
DISCUSSION

Appellant challenges the trial court's decision to bar recovery of an additional $12,479.12, the amount that CSAA paid to him for the property damage to his car. "When there is no conflicting evidence on an issue, as here, the ultimate conclusion to be drawn from the evidence is a question of law. In the absence of any controverted factual evidence on this appeal, therefore, we are presented with a pure question of law for which the appropriate review is de novo." (*Miller v. Ellis* (2002) 103 Cal.App.4th 373, 378.)

When CSAA paid appellant to reimburse him for the property damage to his car, CSAA became subrogated to appellant's claim against respondent, to the extent of its payment. (*New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1093 [insurer's " 'subrogated right [was] its right to be put in the position of its insured against third parties legally responsible to its insured for the loss which the insurer has both insured and paid.' "].) "Pursuant to the subrogation doctrine, when an insurer has paid an insured the amount of a loss caused by a third party, the

---

2 The trial court declined to award appellant damages for the diminution in value of his car, a ruling that appellant does not challenge on appeal.

3 The trial court later issued an amended judgment awarding appellant costs, a ruling that respondent does not challenge on appeal.

insurer may step into the shoes of the insured and pursue the insured's rights and remedies against the third party tortfeasor." (*Allstate Ins. Co. v. Mel Rapton, Inc.* (2000) 77 Cal.App.4th 901, 908 (*Mel Rapton*).) CSAA, as appellant's subrogee, sought through arbitration to recover the amount it paid (but not the total amount appellant claims he was damaged) from respondent's insurance company, Farmers. Respondent was not a party to arbitration; however, respondent argues (and appellant does not offer argument to the contrary) that he was in privity with Farmers, because the insurance company was litigating the matter of his liability as his agent. (*Interinsurance Exchange of the Auto. Club v. Superior Court* (1989) 209 Cal.App.3d 177, 183-184.) The arbitrator was asked to determine whether respondent was negligent in causing the accident with appellant; the arbitrator concluded that CSAA had not proven that respondent was, in fact, negligent.

The resolution of this case turns on what effect the decision in the insurance companies' arbitration has on appellant's ability to recovery in this action. "In its narrowest form, res judicata ' "precludes parties or their privies from relitigating a *cause of action* [finally resolved in a prior proceeding]." ' [Citations.] But res judicata also includes a broader principle, commonly termed collateral estoppel, under which an *issue* ' "necessarily decided in [prior] litigation [may be] conclusively determined as [*against*] the parties [*thereto*] or *their privies* . . . in a subsequent lawsuit on a *different* cause of action." ' [Citation.]" (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828 (*Vandenberg*), original italics.) " ' "Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." ' " (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897.) "The doctrine of res judicata applies not only to judicial proceedings but also to arbitration proceedings." (*Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 755.)

Respondent contends that both res judicata and collateral estoppel apply here; appellant addresses only the doctrine of collateral estoppel, arguing that it does not

apply.[4] Citing *Mel Rapton, supra,* 77 Cal.App.4th 901, respondent argued in the trial court that appellant's entire complaint was barred by the doctrines of res judicata and collateral estoppel because of the prior arbitration decision. In *Mel Rapton*, a car owner's vehicle was damaged after a car dealer negligently repaired the car's cigarette lighter, and the car owner's insurance company reimbursed her for her loss after a resulting fire. (*Id.* at pp. 904-905.) The owner then brought a small claims action against the dealer, and judgment was entered in her favor in the amount of $386. (*Id.* at p. 905.) Her insurance carrier, as her subrogee, later sued the same car dealer for damages in the amount it had paid to her (minus the salvage value of the car). (*Id.* at pp. 905-906.) The court held that the judgment in the small claims action precluded the insurance carrier's subsequent action arising from the same fire that resulted from the dealer's negligent repair of the car's cigarette lighter. (*Id.* at p. 907.) "When, as often happens, the insured is only partially compensated by the insurer for a loss . . . , operation of the subrogation doctrine 'results in two or more parties having a right of action for recovery of damages based upon the same underlying cause of action.' [Citation.] The insured retains the right to sue the responsible party *for any loss not fully compensated by insurance*, and the insurer has the right to sue the responsible party for the insurer's loss in paying on the insurance policy. [Citation.] The insurer is not limited to an action in intervention but may bring a separate independent action to recover directly from the third party tortfeasor." (*Id.* at p. 908, italics added.)

---

4 Although this issue has not been addressed in any meaningful way by the parties, we note that both the trial court and respondent apparently contend that the "issue" that was decided in the arbitration was whether CSAA was entitled to the amount of money that appellant seeks in this action. In fact, the arbitrator apparently never considered the amount of damages to which CSAA was entitled, because the arbitrator concluded that CSAA had failed to prove that respondent was *negligent*. Although respondent argues that this court should give preclusive effect to an arbitration decision that found that CSAA failed to prove his negligence, he essentially conceded liability in this action. Respondent's admission of liability is completely inconsistent with his insurance company's position in the arbitration—that he was not negligent.

However, "[a]lthough the insurer may bring a separate action against the tortfeasor, *the rule against splitting a cause of action is violated where both the insurer and insured pursue separate actions*. [Citations.] This is so because the general rule of subrogation provides that an insurer stands in the shoes of its insured; if a second action by the insured is barred, so is the action by the insurer. [Citations.] To avoid a violation of the rule against splitting a cause of action, the insured and insurer 'should join in a single suit against the tortfeasor.' " (*Mel Rapton, supra*, 77 Cal.App.4th at pp. 908-909, italics added.) "The rule against a plaintiff splitting a single cause of action so as to make it the basis of several suits is, in part, an application of the doctrine of res judicata." (*Id.* at p. 907.) The *Mel Rapton* court concluded that where an insured tort victim fails to include all damages in an action against a tortfeasor, neither the insured nor the subrogee-insurer can sue again. (*Id.* at p. 913.)

The trial court in this action relied on *Mel Rapton* when it concluded that appellant only retained the right to recover his unreimbursed loss against respondent, stating, "the insured retains the right to sue the responsible party for any loss not fully compensated by insurance, and the insurer has the right to sue the responsible party for the insurer's loss in paying on the insurance policy." The court did not address *Mel Rapton*'s central holding, that where an insurer and an insured pursue separate actions an impermissible splitting of a cause of action results. (*Mel Rapton, supra*, 77 Cal.App.4th at pp. 909, 913-914.) Under the rule against splitting a cause of action, appellant arguably would not be able to bring a separate action against the tortfeasor, at least as to those sums its insurer sought in the prior arbitration. Although the appellate record does not include relevant briefing on the issue, it appears from the transcript of the court trial that respondent did not specifically rely upon this central holding of *Mel Rapton* below.[5] (*Id.* at p. 908.)

---

5 A tortfeasor's failure to object on the grounds of impermissible splitting of a cause of action waives the defense. (*Mel Rapton, supra*, 77 Cal.App.4th at pp. 909-910.) Although he did not argue below that appellant's suit was an impermissible splitting of a cause of action, which is itself an application of the doctrine of res judicata, because respondent was permitted to amend his answer to allege the general defense of res judicata, a waiver of this defense did not result.

However, Respondent did not cross appeal from the judgment. Although his counsel argued below that *Mel Rapton, supra*, 77 Cal.App.4th 901 was "exactly on point with the facts of this case," respondent does not question on appeal the trial court's conclusion that it was appropriate to award appellant the $450 (the damages not compensated by insurance). Instead, he claims that res judicata applies here, yet he takes the arguably contrary position that CSAA and appellant did not split a cause of action. Having failed to file a cross appeal or to raise any of these issues on appeal, respondent has waived them. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 [issues not raised on appeal are waived]; *Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744, 758, fn. 9 [respondent must file own notice of appeal in order to obtain affirmative relief by way of appeal].)

Respondent argues that the trial court correctly concluded that appellant "lacks standing" to sue for the money already paid to him by CSAA, relying on *Mel Rapton, supra*, 77 Cal.App.4th 901. The trial court did not determine that appellant lacked standing to sue for an amount including that which had been paid to him by CSAA, but rather determined that because CSAA lost its claim against Farmers in arbitration, he could not recover that amount in his suit against respondent. Decisions have referred to the insured's right to sue, in cases where the insurer has made only partial payment to the insured, as the ability to " 'sue the responsible party *for any loss not fully compensated by insurance* . . . .' " (*Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 551, italics added, citing *Mel Rapton, supra*, 77 Cal.App.4th at p. 908.) But those same cases recognize that the insurer in such a case may choose one of three options: (1) intervene in the insured's lawsuit against the tortfeasor (if there is such a suit), (2) elect to wait to recover the funds from its insured once the insured has resolved its claim with the tortfeasor, or (3) initiate an action against the tortfeasor. (See *Mel Rapton, supra*, 77 Cal.App.4th at p. 908.) Here, consistent with its subrogation agreement in appellant's contract, CSAA elected to pursue its own action to recover the amount it paid its insured, by way of binding arbitration, directly against the tortfeasor's insurer. The insurer having done so, and having lost, the question presented in the present case is not

whether the insured had "standing" to independently sue the tortfeasor, but whether the arbitration decision precluded him from recovering the amount at issue in the arbitration. The doctrine of res judicata "seeks to curtail *multiple litigation* causing vexation and expense to the parties and wasted effort and expense in judicial administration." (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 334, p. 938, italics added.) Respondent, it is again noted, did not cross appeal.

We turn then to whether we may affirm the trial court's decision to give preclusive effect to the arbitrator's decision in the arbitration between the parties' insurance companies and to deny recovery of the money that CSAA paid to appellant. The trial court concluded that CSAA would have a "second bite at the apple" were the court to award appellant those damages, because the insurance company had already lost its subrogation claim for that amount in arbitration. On this issue, appellant argues that the trial court should have followed *Vandenberg, supra*, 21 Cal.4th 815, which held that a private arbitration award cannot result in nonmutual collateral estoppel unless the parties to the arbitration agree that such a consequence should attach. (*Id.* at pp. 833-834, 836-837.) *Vandenberg* would apply, however, only if respondent were not considered a party to the arbitration by virtue of his insurance company's defense of CSAA's claim, but rather deemed to be a "third party."

Appellant simply asserts that "CSAA could have sued respondent Wong for the amount it paid to appellant on its insurance policy, [but] it did not do so." We agree with respondent that he was in privity with Farmers, his insurance carrier, by virtue of Farmers' defense of him in the arbitration. (*Interinsurance Exchange of the Auto. Club v. Superior Court, supra*, 209 Cal.App.3d at pp. 183-184.) *Vandenberg, supra*, 21 Cal.4th 815 therefore does not apply here, because a "third party" is not seeking to apply collateral estoppel stemming from the arbitration decision. We therefore reject appellant's sole claim of error with respect to the application of the doctrine of collateral estoppel.

Appellant also argues that the "collateral source rule" is applicable in this case, citing *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1. The *Helfend* court

held that "if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." (*Id.* at p. 6.) *Helfend* indicated that the collateral source rule applies even if the collateral source would be repaid from the tort recovery "through subrogation, refund of benefits, or some other arrangement." (*Id.* at pp. 13-14.) Had appellant's subrogee (CSAA) not sought recovery from respondent's insurance carrier, and had respondent's negligence not been litigated in another forum, we might agree that the collateral source rule is applicable here. However, we are confronted with a situation where an arbitrator has denied the exact same relief that appellant seeks in this action. Although it is technically true that "respondent has not been held liable for [appellant's] property damage to anyone," CSAA *did* seek a finding of such liability in the arbitration. In other words, even if the collateral source rule applied, the preclusive effect of the arbitrator's decision nonetheless bars recovery.[6]

In affirming the judgment, we are mindful of the "fundamental rule of appellate review that the judgment appealed from is presumed correct and ' " 'all intendments and

---

6 Respondent additionally argues that the collateral source rule is inapplicable because Farmers faces potential double liability for the same property damage, citing *Ferraro v. Southern Cal. Gas Co.* (1980) 102 Cal.App.3d 33, 46. In *Ferraro*, plaintiffs' property was destroyed by an explosion and fire; they were reimbursed by their insurance company for the property damage they suffered. (*Id.* at pp. 37-38.) The insurance company filed suit against defendant gas company, and plaintiffs later filed a separate suit against defendant. After finding that the impermissible splitting of the cause of action was waived by defendant's failure to object, the court of appeal held that the insurance proceeds collected by plaintiffs were not a collateral source. (*Id.* at pp. 46-47.) As the court explained, "a collateral source is one ' "wholly independent of the tortfeasor." ' [Citation.] Therefore, since '[to] subrogate is to put in the place of another; . . .' when an insurance carrier becomes subrogated to the claim of an insured against a third party tortfeasor, the payment of insurance proceeds is no longer a 'collateral source.' [To conclude otherwise] would violate the rule against double recovery, since both the subrogee and the subrogor have a right of action against the tortfeasor." (*Id.* at p. 47.) Due to the preclusive effect of the arbitration decision in the present case, we need not reach this separate argument in favor of affirming the trial court's decision.

presumptions are indulged in favor of its correctness.' " [Citation.]' [Citation.] An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. 'Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.' [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citation.]" (*Benach v. County of Los Angeles*, *supra*, 149 Cal.App.4th at p. 852.)

Here, respondent argues that the elements of both res judicata and collateral estoppel were met.[7] Appellant addresses only one element of collateral estoppel, arguing that respondent may not rely on the arbitration award because he was not a party to the arbitration (an argument this court has rejected). Having failed to address any of the other elements of collateral estoppel, or res judicata, appellant has waived such arguments on appeal. (*Benach v. County of Los Angeles*, *supra*, 149 Cal.App.4th at p. 852.)

Appellant also fails to present in his opening brief any argument regarding the legal effect of respondent essentially conceding the issue of liability in this action. He

---

[7] It is not entirely clear whether the trial court relied on the doctrine of res judicata (claim preclusion) or collateral estoppel (issue preclusion) when it made its ruling. It granted respondent's motion to amend his answer to allege *both* res judicata *and* collateral estoppel, but did not specify which doctrine applied. It stated that CSAA would have a "second bite at the apple" were the court to award appellant damages, because the insurance company had already lost its subrogation *claim* in arbitration, a possible reference to claim preclusion. However, when appellant argued that the court should not apply collateral estoppel because the parties did not participate in the prior arbitration proceeding (*Vandenberg*, *supra*, 21 Cal.4th 815), the trial court distinguished *Vandenberg* by stating that the case "was not a subrogation situation." The court may have meant that, unlike in *Vandenberg*, collateral estoppel (the only doctrine at issue in that case) applied here; however, the court did not explicitly say so. The trial court issued no statement of decision, which would have "allow[ed] the court to place upon the record its view of facts and law of the case." (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647, italics omitted.)

states that "both respondent's negligence (fault) and the amount of appellant's property damages is [*sic*] virtually undisputed," without offering any argument or legal authority as to the significance of respondent's concession. In his reply brief, he makes general statements about the significance of stipulations, then argues in passing, without citation to the record or legal authority, that the stipulation regarding fault precludes respondent from relying on contrary evidence (in the form of an arbitration decision) with respect to the issue of liability. It is settled that "an appellant must affirmatively demonstrate error through reasoned argument and discussion of legal authority. [Citations.] Simply hinting at an argument and leaving it to the appellate court to develop is not adequate." (*Cryoport Systems v. CNA Ins. Cos.* (2007) 149 Cal.App.4th 627, 633.)

Finally, appellant waits until his reply brief to argue, without citation to the record or any legal authority, that he "was denied due process by the application of the doctrine of res judicata because appellant had no notice or knowledge of the arbitration prior to its completion, had no opportunity to introduce evidence or challenge the evidence submitted in the arbitration, and could not reasonably have expected to be bound by the arbitration at the time it occurred." "Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.) Having found no good reason to consider appellant's unsupported arguments that are presented for the first time in his reply brief, we decline to consider them. (*Ibid.*)

III.
DISPOSITION

The judgment is affirmed. Respondent shall recover his costs on appeal.

_____
Sepulveda, J.

We concur:

_____
Reardon, Acting P.J.

_____
Rivera, J.